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No. 695

In the Supreme Court of the United States

OCTOBER TERM, 1961

MINNIE WHITEFOOT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a–11a) is reported at 293 F. 2d 658.

JURISDICTION

The judgment below was entered on July 19, 1961. A timely petition for rehearing was denied October 4, 1961. By order signed by the Chief Justice on December 16, 1961, the time for filing a petition for a writ of certiorari was extended to February 1, 1962. The petition was filed on January 31, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether an individual member of an Indian tribe has a compensable property interest in an exclusive right to take fish from certain rivers, which right was granted to the tribe by the United States by treaty and for the destruction of which the United States has compensated the tribe.

STATEMENT

This is a suit to recover compensation for the taking of certain alleged fishing rights, claimed to be the individual property of petitioner, in the Columbia River near Celilo Falls in the States of Oregon and Washington. The taking is through inundation resulting from the construction by the United States of the Dalles Dam, completed in 1956.

Petitioner is an Indian enrolled in the Yakima Nation, a confederation created and granted a reservation by the Treaty between the United States and the Yakima Nation, June 9, 1855, 12 Stat. 951. By the treaty, the tribes gave up their claim by Indian title to the territory over which they roamed, in return for recognition by the United States of a part of this territory as a reservation. Article III of the treaty "secured to said confederated tribes and bands of Indians," "[t]he exclusive right of taking fish in all the streams, where running through or bordering said reservation, * * * as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory * * *."

Construction of the Dalles Dam caused the inundation of the fishing stations from which the Indians had customarily taken the fish. Congress, by Act of July

27, 1953, 67 Stat. 197, authorized payment to the tribes of compensation for the loss of the fishing rights. Except in the case of Indians not enrolled in tribes, the payments were to be made to the tribes, and not to individual Indians. Under this authority, the United States entered into an agreement with the Yakima Tribe, which provided for payment of some $15,000,000 in full consideration for the destruction of the fishing rights. Petitioner and her family have already received more than $22,000 of this payment upon a per capita distribution by the tribe (293 F. 2d at 672, 674).

Petitioner alleged that she was the owner of an exclusive right to use six fishing stations in the inundated area; that such exclusive use was a right passing from generation to generation; and that the loss of this right was compensable. But the Court of Claims found (Finding 6, 293 F. 2d 658, 666):

> Fishing stations were deemed to be the communal property of the tribe. * * * This right of individual Indian families to use, occupy, and fish from specific fishing stations amounted primarily to a right, infrequently exercised, to exclude others from using the same stations. It was a right which the Indians recognized by custom and usage as passing down from one generation to the next through the family line. The right could not be sold or transferred by its immediate holder.

The court dismissed the suit on the following grounds (293 F. 2d 658, 663):

> [T]he use of accustomed fishing places, whether on or off the reservation, is a tribal right for

adjustment by the tribe and * * * the fact that certain Indians have been allowed to have sole use of a particular spot by the Tribe gives that individual no property right against the Tribe and does not limit the Tribe's right to collect the damages for obliteration of fishing spots by the dam. We hold further that Minnie Whitefoot has no claim against the United States.

ARGUMENT

1. The Court of Claims correctly held that petitioner has no claim against the United States. Until recognized by treaty, Indian title covers the right of use and occupancy only and is not a compensable property interest. *United States* v. *Tillamooks*, 341 U.S. 48; *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272; see *Johnson* v. *McIntosh*, 8 Wheat. 543. Since neither the tribes nor their individual members had a compensable property interest in the right to take fish from the Columbia River prior to the 1855 treaty, the only right against the United States in the present case must stem from that treaty. The 1855 treaty secured only "to said confederated tribes and bands of Indians" the right to take fish from "all usual and accustomed places." The treaty therefore secured only a tribal right and not an individual right. See *United States* v. *Winans*, 198 U.S. 371; *Seufert Bros. Co.* v. *United States*, 249 U.S. 194; *Tulee* v. *State of Washington*, 315 U.S. 681.[1]

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[1] The express language of the treaty is in accord with the usual rule that treaties with the Indian tribes and nations are usually construed as referring only to tribal rights. See *The Cherokee Trust Funds*, 117 U.S. 288; *Blackfeather* v. *United*

2. The petition presents no important question of federal Indian law that has not already been decided adversely to petitioner's claim. The cases already cited (*supra*, p. 4 & n. 1) dispose of petitioner's contention (Pet. 8) that the status of an individual Indian's rights in tribal property has not been authoritatively determined. For the same reason, petitioner's assertion (Pet. 5) that this case is important to the administration of Indian affairs has no merit.

Contrary to petitioner's suggestion (Pet. 9–10), *Cramer* v. *United States*, 261 U.S. 219, does not indicate that individual rights exist in tribal property in the context of the present case. The *Cramer* case involved the protection of individual Indians by the United States against third parties and not an assertion of an individual right against the United States in addition to the tribal right.

Finally, petitioner asserts (Pet. 11–13) that Finding 6 of the Court of Claims (quoted *supra*, p. 3) with respect to the tribal custom of individual use of specific fishing stations is irreconcilable with the holding that an individual use is not a compensable interest. But in Finding 6, the court's description of the limited form of individual use of the fishing stations does not detract from its basic finding that the "[f]ishing stations were deemed to be the communal

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States, 190 U.S. 368; *The Sac and Fox Indians*, 220 U.S. 481. No individual Indian has a right to any specific part of the tribal property; his use and occupancy depends upon tribal customs and law. See *Delaware Indians* v. *Cherokee Nation*, 193 U.S. 127; *Sizemore* v. *Brady*, 235 U.S. 441; *United States* v. *Chase*, 245 U.S. 89; *McDougal* v. *McKay*, 237 U.S. 372; *Gritts* v. *Fisher*, 224 U.S. 640.

property of the tribe." In any event, even if petitioner's interpretation of the finding were accepted, tribal custom as to individual use would be irrelevant in determining compensability of the use, because no compensable right exists without treaty sanction and the 1855 treaty recognizes only a tribal right.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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